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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1388

ERLE E. PEACOCK, JR.,
Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITIES AND STATE COLLEGE OF ARIZONA; JACK R. WILLIAMS, WELDON P. SHOFSTALL; PAUL L. SINGER, SIDNEY S. WOODS, GORDON D. PARIS, JAMES E. DUNSEATH, MARGARET M. CHRISTY, KENNETH G. BENTSON, RALPH M. BILBY and RUDY E. CAMPBELL, each of the foregoing individually and in his or her capacity as a member of the Board Of Regents Of The Universities And State College Of Arizona; JOHN LENTZ and NORMAN SHARBER, each individually; JOHN P. SCHAEFER, individually and in his capacity as President of the University of Arizona; MERLIN K. DU VAL, individually and in his capacity as Vice President for Health Sciences and Acting Dean of the College of Medicine, University of Arizona; and DOUGLAS H. LINDSEY, individually and in his capacity as Acting Head of the Department of Surgery, College of Medicine, University of Arizona,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 520 F.2d 1324, as Peacock v. Board of Regents of the Universities and State College of Arizona. The first opinion rendered by the District Court for the District of Arizona entitled ORDER

RE PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION made by the Honorable Howard B. Turrentine, United States District Court Judge, is reported in 380 F. Supp. 1081. The second opinion rendered by the same judge entitled ORDER DENYING PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION AND/OR SUMMARY JUDGMENT which will not be reported, appears as Appendix A herein.

Counterstatement of Questions Presented

1. Whether, under the *First* and *Fourteenth Amendments* a tenured professor in a state university college of medicine who also serves in a nontenured administrative capacity as Head of the Department of Surgery may be suspended with pay from his administrative assignment pending a due process administrative hearing.

2. Whether in determining if a post-suspension but pre-termination hearing is sufficient to satisfy due process requirements, the trial Court is permitted to balance the university's interest in the prevention of harm to and efficient administration of the medical school and the university hospital against the employee's interest in a hearing before rather than after he was suspended with full pay from performance of duties as department head.

Counterstatement of the Case

It is the position of respondents that the Orders of District Judge Turrentine and the opinion of Judge Koelsch of the Circuit Court of Appeals adequately and effectively summarize the allegations of the Complaint and the evidence adduced at the hearing and correctly isolate and define the issues.

REASONS FOR DENYING THE WRIT

1. The decision below does not in any way conflict with any decision of the Supreme Court of the United States. It is in complete conformity on all issues with all of the applicable cases cited by petitioner and discussed by Judge Koelsch in his opinion.

2. The decision below does not conflict with the decision of the Seventh Circuit in Hostrop v. Board of Junior College District No. 515, 47 F.2d 488, 494-495 (7th Cir. 1972). Although factually similar, Hostrop is readily distinguishable from the instant case. Hostrop reached the Seventh Circuit Court of Appeals upon a dismissal of the complaint by the District Court for failure to state a claim upon which relief could be granted. Hostrop, President of a junior college circulated an ethnic studies proposal that might have offended the "sensibilities" of the Board that hired him. The publication of the memorandum was mentioned as being a prime reason for Hostrop's subsequent termination, although he was told that he would be fired without any notification of the charges against him. Hostrop's complaint concluded that the alleged facts showed a deprivation of his right to free speech and a denial of due process of law, and asked that the Court order the college to give him a full and complete hearing, enjoining the defendants from replacing him with another person as president, and declare that his dismissal violated his First Amendment rights. The United States District Court dismissed the complaint for failure to state a claim upon which relief can be granted. The Circuit Court in reversing say: "Having found that plaintiff has asserted protected interests that are entitled to due process procedural safeguards, we must balance the interests of the state against those of the individual

to determine the form of hearing that Dr. Hostrop is entitled to before his termination.

There are thus two important distinctions between Hostrop and Peacock. In Hostrop the complaint had been dismissed without a hearing, so there was no basis upon which the Court could balance the opposing interests. In Peacock, the District Court issued its order after four days of hearing and taking of factual testimony upon which to balance all of the competing interests.

In Hostrop, the Seventh Circuit ordered a pretermination hearing. In the instant case the District Court reinstated Peacock and granted him a *pretermination* hearing, the results of which were part of the record before the Ninth Circuit. (See Appendix B herein.)

The Ninth Circuit in affirming the District Court simply decided that under the circumstances of this case the reinstatement with option to suspend with pay pending a college hearing satisfied the requirements of due process and that therefore the Court committed no error in limiting its injunction.

The decision below turns upon its own facts that will affect few others than the litigants. In the Circuit Court's view, the District Court properly balanced the equities and permitted a post-suspension hearing with pay. Nevertheless, it was in fact a *pretermination* hearing. The Court held that the potential disruption greatly outweighed the limited interests of the plaintiff in a *presuspension* hearing. Moreover, the plaintiff has an adequate remedy at law for money damages, if any, that may appear after a full trial.

CONCLUSION

There is no necessity at this stage of this case for issuance of a writ of certiorari. On the contrary, the interests of justice would best be served by permitting this case to proceed to trial as quickly as possible. Thereafter, any remaining issues of moment may be considered by this Court. The petition should therefore be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ERLE E. PEACOCK, JR., Plaintiff v. BOARD OF REGENTS OF THE UNIVERSITIES AND STATE COLLEGE OF ARIZONA; et al., Defendants.	CIV. 74-123 HBT ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND/OR SUMMARY JUDGMENT

Plaintiff has filed a motion for a preliminary injunction or, in the alternative, for summary judgment regarding Count V of plaintiff's First Amended Complaint.

Count V of the First Amended Complaint alleges that the University of Arizona's faculty dismissal procedures fall short of minimum due process, that defendants DuVal, Schaefer, and Lindsey failed to comply with the University's faculty dismissal procedures, and that plaintiff's dismissal has been initiated as reprisal for public statements, which reprisal violates the First Amendment to the United States Constitution applied to the states through the Fourteenth Amendment.

Plaintiff's motion for preliminary injunction or, in the alternative, for summary judgment rests on three grounds:

1. That the dismissal procedures of the University of Arizona violate procedural due process;

2. That the defendants have failed to comply with the University's dismissal procedures; and,

3. That the dismissal proceedings against plaintiff cannot proceed until plaintiff has received a due process hearing regarding his suspension.

Preliminary Considerations

In considering a request for a preliminary injunction, a court must weigh:

1. The threat of irreparable harm to the petitioner if the injunction is not granted;

2. The injury that granting the injunction would inflict on the opposing party;

3. The probability that petitioner will succeed on the merits at the subsequent trial; and,

4. The larger public interest.

The above factors were enumerated in this court's Order of May 3 in connection with a previous motion for preliminary injunction in this same case. That Order is hereby incorporated by reference particularly in regards to its discussion of the background to this litigation and the facts relevant to plaintiff's complaint.

The University's Dismissal Procedures Appear to Meet Minimum Due Process Requirements

It is enough to answer almost all of plaintiff's arguments to merely quote from the University's General Faculty Bylaws, Revised to September 1966.

Plaintiff contends that procedural due process requires that the notice of charges be sufficiently detailed to permit the individual to adequately respond. Section 12(b)(ii)(a) of the Faculty Bylaws requires "Service of notice of hearing with specific charges in writing. . . ."

Plaintiff next contends that procedural due process requires that the individual with a protected interest be given notice, in advance of the hearing, of the names of witnesses against him and the nature of their testimony. Section 12(b)(ii)(b) provides that the faculty member whose dismissal has been recommended has "A right to the names of the witnesses and of access to documentary evidence upon the basis of which the dismissal is sought. Adjournments shall be granted to enable either party to investigate evidence as to which a valid claim of surprise is made." While the Bylaws do not expressly provide for disclosure of the testimony of the proposed witnesses, this court believes that the conjunction of (ii)(a) requiring specification of charges with (ii)(b) requiring the disclosure of the names of the witnesses supplemented by (ii)(b)'s safeguard against surprise comports with minimum due process.

Plaintiff further contends that procedural due process requires the right to cross-examine adverse witnesses. Section 12(b)(ii)(e) provides the faculty member whose dismissal has been recommended with "A right to confront and cross-examine witnesses against him."

Additionally, plaintiff contends that procedural due process requires an open hearing. Section 12(b)(ii) states that "The hearing shall be a closed hearing unless the appellant requests a hearing open to the University."

Plaintiff further contends that due process requires that the hearing be before a fair and impartial tribunal. Section 12(b)(i) describes the composition of the Committee on Academic Privilege and Tenure [CAPT] before whom dismissal recommendations are finally heard once it becomes apparent that the customary administrative channels and the Committee on Conciliation are not able to resolve the dispute.

CAPT consists of three faculty members. One member is appointed by the University Committee on Committees, one by the President of the University, and one by these two members. The appointment is for three years, the terms of office are staggered, and members are eligible for reappointment. This court believes that CAPT has "apparent impartiality." *Hostrop v. Bd. of Junior College Dist. No. 515, etc., Ill.*, 471 F.2d 488 (7th Cir. 1972). Nothing before this court at this time indicates that the presidential appointee is a mere instrument of the President or that he is so tainted with bias by the mere fact that he is the President's appointee, that his participation in plaintiff's dismissal proceedings would make a sham and a farce of the hearings. At this stage, this court refuses to impugn the motive or character of any tenured faculty member. It is neither self-deluding nor naive for this court to assume on the present state of the record that the members of CAPT will act in ways intended to afford plaintiff the traditional safeguards of due process. *Greene v. McElroy*, 360 U.S. 474, 507 (1959).

Finally, plaintiff contends that the University's dismissal procedures are a "mockery" of due process in that the decision of CAPT is only a recommendation by CAPT to the President of the University. Mr. Justice Marshall, concurring and dissenting in *Arnett v. Kennedy*, 42 U.S.L.W. 4513 (April 6, 1974), wrote that "for the hearing to be meaningful . . . [the hearing officer's] decision [must] be entitled to some weight." The Ninth Circuit recently had before it a case in which the President of a University refused to follow the recommendation of the University's Hiring, Retention and Tenure Committee. While the specific issue was not before the court, had such a procedure made a "mockery" of due process the facts of the case would almost have compelled

some indication of disapproval. *Jablon v. Trustees of the California State Colleges, et al.*, 482 F.2d 997 (9th Cir. 1973). This court has not found, nor have plaintiff's counsel offered, authority for the proposition that the decision of the officer or collegiate body before whom the hearing is held must be binding on the President of the University.

It is difficult to understand how the University's dismissal procedures could fail to satisfy even those intent on finding fault at any cost. The University's dismissal procedures certainly satisfy this court's sense of rudimentary fairness and such fairness is what due process requires. Plaintiff's motion for preliminary injunction or, in the alternative, for summary judgment on the grounds that the University's dismissal procedures fall short of minimum due process is hereby denied.

Defendants Have Substantially Complied with the University's Dismissal Procedures

Plaintiff has not been dismissed as Professor of Surgery at the University of Arizona. Plaintiff has, however, been suspended with pay pending the outcome of hearings scheduled before CAPT regarding his recommended dismissal. Plaintiff's contention, therefore, in his motion for a preliminary injunction is that the dismissal proceedings have been improperly initiated and that they must therefore be enjoined until such time as the initiation conforms to the University's rules and regulations.

Chapter VIII of the Faculty Manual, 13th ed., August 1973, contains the provisions relevant to the initiation of dismissal proceedings. Section 8.07 (a section under the heading "Academic Appointments") states that a department head or dean shall designate a committee of at least three tenured faculty members to advise him before making his recommen-

dation as to a faculty member's "appointment, reappointment, promotion, granting of tenure, dismissal, or nonretention. . . ." Section 8.19 (a section under the heading of "Release and Dismissal"), however, authorizes any University official to recommend the dismissal, but only the dismissal, of a faculty member. Once the recommendation has been made, Section 8.20 provides the faculty member whose dismissal has been recommended with the right to request an investigation either by a committee of at least three faculty members, appointed by the dean of the relevant college, or by the Committee on Conciliation.

Plaintiff argues that the above procedures were violated in that:

1. His dismissal was "requested" and not "recommended";
2. Defendant Lindsey, who requested the dismissal, did not select a committee of three faculty members to advise him prior to requesting dismissal; and
3. Defendant Lindsey was not the Head of the Department of Surgery nor was he a dean of any college.

Since this court views the Faculty Bylaws as requiring specification of charges, this court will treat plaintiff's contention that he has not been furnished with a specification of charges sufficiently detailed to permit him to adequately respond as a fourth allegiation of noncompliance.

This court views the distinction between "request" and "recommendation" as inconsequential. Similarly, plaintiff's argument that University procedures were violated in that the person requesting the dismissal, Dr. Lindsey, was not a head of a department or dean has little merit. First, Dr. Lindsey was "Acting Head" of the Department of Surgery. Second, the University rules do not limit the power to recommend dismissal to deans or department heads. See Section 8.07. An

"Acting Head" is, if not a "Head" within the meaning of Section 8.19, a "University official" within the meaning of Section 8.07.

The defendants concede that University procedures were not followed in respect to the convening of a three-member panel to advise the dean, head, or other University official regarding the dismissal of plaintiff here. This court's May 3 Order describes the conditions at the University of Arizona, College of Medicine at the time plaintiff's dismissal was requested. The May 3 Order's recitation of facts is, in keeping with the character of these preliminary proceedings, tentative; there has not yet been a plenary hearing. Nevertheless, it is this court's view at this stage of the proceedings that the same extraordinary circumstances which appear to have existed at the College of Medicine and which justified plaintiff's immediate suspension with pay also might justify the deviation from University procedure complained of here.

Furthermore, the University endeavored to correct its error. Shortly after Dr. Lindsey requested plaintiff's dismissal, the University's Executive Vice President appears to have discovered the error in procedure. Having discovered the error, a three-member panel was convened before which certain charges were presented for their advice with respect to whether those charges, if proved, would constitute unprofessional conduct of a sufficiently serious nature to warrant dismissal. The panel advised that the charges if supported would warrant dismissal. Plaintiff complains that the panel, convened after the fact, was merely used to ratify a prior decision; that the well was poisoned by Dr. Lindsey's request for dismissal without the benefit of prior consultation. Since the University's rules and regulations provide that the head, dean or other University official contemplating recommending dismissal creates the well, i.e., convenes a panel of any three

faculty members, the error complained of here appears at this stage to have been harmless. The breach of the University's rules and regulations did not substantially compromise the integrity of the quasijudicial procedures of the University of Arizona.

Finally, were this court to accept plaintiff's argument regarding the significance of the failure to convene the advisory group, how could the University ever correct an error? One could view the situation presented here as having involved a false start: When Dr. Lindsey requested plaintiff's dismissal, that act might well have had no effect because it failed to comply with Section 8.07. However, after the panel was consulted Section 8.07 had been complied with and the requested dismissal could be deemed to be effective from that time. In short, plaintiff's contention that the University's failure to initially convene the three-member advisory panel now prevents the University from going ahead with hearings regarding plaintiff's dismissal, hearings which as discussed previously meet the requirements of due process, is hereby rejected.

Finally, plaintiff contends that the charges of which he is accused have not been specifically enough disclosed to permit him to respond. The various allegations against plaintiff are contained in Dr. Lindsey's letter of February 9, 1974, and Dr. DuVal's letter of February 19, 1974. The February 9 letter enumerates three incidents which in Dr. Lindsey's opinion substantiated the charges of disrupting the activities of the Department of Surgery, making false statements to the Acting Head of the Department thereby impeding the functioning of the Department, and making reckless statements impugning the honesty, reputation and motives of the President of the University, the Vice President for Health

Sciences and several other University officials.

This court believes that the accusations made by Dr. Lindsey in his February 9 letter are specific enough to allow plaintiff to properly prepare his defense. They are not so vague as to make effective refutation impossible.

Plaintiff Is Not Entitled to Separate Suspension Hearing

"If the employee actually threatens to disrupt the operation of the office, he could be put on administrative leave or temporarily assigned to a less sensitive position pending his hearing. . . ." J. Marshall, concurring and dissenting *Arnett v. Kennedy* supra.

"One must also consider another type of cost to the Government if preseparation hearings were provided—the necessity of keeping a person on the scene who might injure the public interest through poor service or might create an uproar at the work place. *However, suspension with pay would obviate this problem.*" [Emphasis added.] J. White, concurring and dissenting, *Arnett v. Kennedy*, supra.

At this preliminary stage of the proceedings, it is this court's view that for plaintiff to continue as Professor of Surgery would seriously threaten the integrity of the College of Medicine. It was with a view towards the larger public interest, i.e., the welfare of the University and the Hospital and the College of Medicine, that this court decided in its May 3 Order that plaintiff's suspension was a proper exercise of the University's inherent powers to maintain the minimum order necessary for spirited and robust debate and inquiry.

Plaintiff here has been suspended but continues to receive his annual salary in excess of $50,000.00 per annum. This court has ordered that defendants provide plaintiff with

hearings regarding his requested dismissal. If plaintiff's name or reputation has been injured, he will have his day in court to clear his name. If the charges are either unfounded or not of sufficient magnitude to warrant dismissal, this court believes that CAPT will make the appropriate recommendation to the President of the University. Plaintiff is not entitled to a separate post-suspension hearing in that the suspension itself is but a part of the dismissal process. It was an action taken by the University in face of what at this stage appears to have been extraordinary and special circumstances. While this court has accepted the analysis in *Lafferty v. Carter*, 310 F.Supp. 463 (W.D. Wisc. 1970) that a suspension with pay does affect a protected property interest, this court rejects the decision that such an intrusion on a property interest requires a prior "preliminary hearing." It is of the essence that the University retain authority to cope with crises on the campus. When suspension with pay is merely a preliminary action, done in the face of serious disturbances on campus, followed quickly by specification of charges and the entire panoply of due process safeguards, a post-suspension hearing is not necessary. This is not to say, however, that inquiry into the conditions existing at the time of the suspension is foreclosed. Such inquiry will no doubt be carried out in the dismissal hearings and at the trial.

Plaintiff's motion for preliminary injunction and/or summary judgment with respect to Count V of plaintiff's first amended complaint is hereby denied.

DATED: July 29, 1974.

/s/ Howard B. Turrentine

Howard B. Turrentine, United States District Judge

COPY TO: ALL COUNSEL

APPENDIX B

COMMITTEE ON ACADEMIC PRIVILEGE AND TENURE

The University of Arizona

August 20, 1974

Report on Removal of Dr. Erle E. Peacock, Jr. as Head of the Department of Surgery

Introduction

On October 26, 1973, Dr. Merlin K. DuVal in his capacity as Acting Dean of the College of Medicine distributed a memorandum to the members of the Administrative Council of the college and to various university administrators informing them that he was relieving Dr. Erle E. Peacock, Jr. as head of the Department of Surgery and was himself assuming the acting headship of the department. This change had previously been communicated to Dr. Peacock and to the members of the surgery department. This action was the culmination of nearly six months of discussions among Dr. DuVal, President John Schaefer, Dr. Peacock, and others concerning dissatisfaction of the university administration with Dr. Peacock's performance as department head. Following meetings on November 23 and 24, 1973, the Arizona Board of Regents issued a public statement that they had removed Dr. Peacock as department head.

The University of Arizona General Faculty Bylaw 12(b)(ii) provides an avenue whereby Dr. Peacock could have requested this Committee to investigate the matter, conduct a hearing, and make recommendations to the President. It also provides that the President may request this Committee to act. During the fall and winter of 1973-74, however, neither Dr. Peacock

nor the President made any approach to the Committee. In a memorandum to the faculty, dated December 5, 1973, Dr. Schaefer did note that Dr. Peacock could come to this Committee, and during the winter several surgery department members did approach the Committee. These persons did not elect to invoke the Committee's jurisdiction.

Members of the surgery department did participate with the Committee on Conciliation in an effort to conciliate their grievance concerning the removal of Dr. Peacock "without prior consultation with the faculty." That committee concluded that conciliation was impossible and so informed the parties. Its memorandum to Vice President Albert Weaver dated December 11, 1973 which reported these fruitless efforts, is firm evidence that conciliation was not possible. It, therefore, became "apparent that complainants . . . [were] unable to obtain satisfactory solutions or adjustments through the customary administrative channels and the Committee on Conciliation."

In the spring of 1974, Dr. Peacock filed a lawsuit against the Board of Regents and various university administrators which was designated as *Peacock v. Board of Regents*, No. CIV 74-123 PHX-HBT. Between March 21 and 27, 1974, a hearing on Dr. Peacock's motion for a preliminary injunction was conducted with United States District Court Judge Howard B. Turrentine presiding. On May 3, 1974, Judge Turrentine ordered the plaintiff be reinstated as department head and gave the university administration the option to relieve him from performing any duties as head "pending a hearing in accordance with the rules and regulations, Faculty Manual, Chap. VIII 13 ed., regarding dismissal of tenured faculty members." Dr. Schaefer reinstated Dr. Peacock as head and then immediately relieved him of any duties pending a hearing.

This panel of the Committee on Academic Privilege and Tenure was convened under authority of Bylaw 12(b)(ii) in order to make an investigation and recommendations upon the request of President John P. Schaefer with respect to the grievance of Dr. Erle E. Peacock, Jr. On May 9, 1974, Dr. Schaefer wrote a memorandum to the Committee in which he stated: "I hereby request that you set in motion the procedures necessary to provide Dr. Peacock a hearing on Dr. DuVal's recommendation that Dr. Peacock should be relieved of his title and all duties related to his position as Head of the Department of Surgery."

Although questions relating to removal of department heads have not heretofore been brought to this Committee, Bylaw 12(b)(ii) indicates that "as a matter of general principle, this Committee shall concern itself with complaints and grievances by members of the faculty in ways designed helpfully to supplement the regular administrative processes of adjusting such matters." The Bylaw also charges the Committee to "receive complaints in writing from individual members of the faculty or from groups of faculty members," to investigate such complaints, and to "make recommendations for solutions or adjustments of the matters involved to the President of the University."

Due to the withdrawal from consideration of this case by one member of the Committee on Academic Privilege and Tenure, Professor Willard Van Slyck, and the unprecedented increase in the number of cases which had been brought to the Committee prior to President Schaefer's request in this matter, it became apparent that it would be necessary for additional faculty members to be asked to participate in the Committee's investigation, hearing, and recommendation in this case. Dr. Russell Davis and Dr. David Hetrick, the two

remaining members of this Committee, consulted with the university Committee on Committees, Committee of Eleven, in-coming and out-going chairmen of the faculty, and other persons as to how best to increase Committee membership. It was decided that several groups of three faculty members would be established as ad hoc panels to conduct the necessary investigations and hearings on behalf of the Committee. The various panels were to be selected in the same manner as the Committee. The panel chosen for consideration of this matter is chaired by Dr. David Hetrick, an appointee of the Committee on Committees and subsequent to July 1, 1974, the chairman of the University Committee on Academic Privilege and Tenure. Dr. Raymond Thompson was selected by the President to serve. Professor Ray Davis was chosen by Dr. Hetrick and Dr. Thompson as the third member of the panel.

The Committee held pre-hearing conferences with counsel for the parties on June 7 and July 3, 1974. Mr. William R. Jones, Jr., representing the University administration, entered into a stipulation approving enlargement of the Committee and creation of this panel. Mr. William Lee McLane, attorney for Dr. Peacock, did not agree to the stipulation insofar as it related to this hearing; he did, however, endorse the stipulation insofar as it related to a subsequent hearing to be held before the same panel concerning the same parties.

At the June 7 conference a time schedule was established for the University administration to file charges with the Committee concerning Dr. Peacock, for a response from Dr. Peacock, for lists of witnesses, and for conduct of a hearing. Counsel made a waiver of the time requirements for notice in order that the case might be heard as expeditiously as possible.

On June 17 the University administration, through

William R. Jones, Jr. and Jack J. Rappeport acting as attorneys, filed two charges with the Committee. They were:

"1) that Dr. Erle E. Peacock, Jr. was removed as Head of the Department of Surgery on October 25, 1973 because he acted unilaterally and independently as a clinical department head and without regard for the impact of the results of his actions on his colleague clinical department heads and on the institution (University of Arizona College of Medicine) as a whole. As a result of the foregoing, the clinical department heads at the College of Medicine University of Arizona lost trust and confidence in Dr. Erle E. Peacock, Jr. as a department head and could not effectively work with him for the good of the University of Arizona College of Medicine.

"2) that Dr. Erle E. Peacock, Jr. in his dealings with people within the College of Medicine and outside of the College of Medicine in the community at large conducted the affairs of the Department of Surgery in an unprofessional manner inimical to the best interests of the College of Medicine."

Also on June 17 the university administration supplied the Committee with a list of witnesses it intended to call in the Committee's hearing.

A memorandum dated June 22, 1974 was sent to the Committee from the office of McLane and McLane, counsel for Dr. Peacock, confirming the position announced to the Committee at the pre-hearing conference on June 7 by William Lee McLane that Dr. Peacock would not be a participant in the headship hearing. The memorandum stated: "Please be notified that, having appealed the May 3, 1974 order of the United States District Court 'authorizing' the University of Arizona to relieve Erle E. Peacock, Jr. as Head of the Department of Surgery pending a hearing in accordance

with Chapter VIII of the Faculty Manual, Dr. Peacock will not participate in any such hearing if one is conducted." At the July 3 pre-hearing conference when Dr. Peacock was present, counsel reiterated this position. On July 9 during the hearing when Dr. Peacock appeared without counsel as a Committee witness, he read a statement of a similar nature.

The Committee regrets the position taken by Dr. Peacock and his legal advisors. Counsel could have made for our record a statement announcing that by participation in our hearing Dr. Peacock did not intend to waive any legal right which related to his appeal and did not waive any remedy which upon appeal he might be afforded. Such a reservation of rights protecting his claims respecting the appeal would have been adequate protection for the position of Dr. Peacock. The Committee recognizes that a faculty member may elect not to appear as a formal party at a Committee proceeding and may choose to come before us as a witness without being represented by counsel. Indeed the Committee wishes to express our appreciation to Dr. Peacock for complying with his duty as a member of the university community by appearing as a witness. But refusal to become a party does not prevent the Committee from carrying out its mandate in the Faculty Manual to investigate the matters in dispute and to make a report with recommendations to the President. In our judgment that investigation in this case could best be accomplished by holding an open administrative hearing.

In accordance with the discussions held during the June 7 and July 3 pre-hearing conferences, the Committee proceeded to hold public hearings at the Moot Court Room of the College of Law during the afternoon of July 3, 1974 and on July 8, 9 and 10. William R. Jones, Jr. appeared as counsel for the University administration; Dr. Peacock did not participate

as a party, nor was he represented by counsel at the hearings. The Committee exercised its right to examine witnesses for the University administration; it also called witnesses of its own, including witnesses favorable to Dr. Peacock; and it called Dr. Peacock himself. These witnesses were cross-examined by Mr. Jones. At the conclusion of the hearings the parties were advised, Mr. Jones orally and Dr. Peacock by letter, of their right to submit to the Committee proposed findings and recommendations and arguments to support them. On July 17 the administration, through Mr. Jones, supplied us with such a memorandum. Consistent with his nonparticipation as a party in the proceedings, Dr. Peacock notified the Committee that he did not wish to exercise his right to make such a submission.

The Committee, in accordance with procedures followed by administrative agencies, bases this report upon the record made in the proceedings. Various exhibits, including the transcript of the proceedings before Judge Turrentine in March 1974 and the exhibits used in that case, were introduced before the Committee and accepted by it. A transcript was kept of the two pre-hearing conferences and of the hearings. Due to a delay in obtaining the entirety of the transcript until August 2, the Committee was unable to render a report about this case prior to starting public hearings concerning another matter relating to Dr. Peacock. We did, however, reach certain tentative decisions after meeting together as a Committee on July 22 and 23. We also deliberated on August 16, and we agreed upon this report and signed it on August 20.

Since this case involves relieving a department head of his duties and title, it was essential that in making our recommendations this Committee ascertain the functions and role of a department head. Consequently, in the remainder of this report, we shall first discuss the nature of a department

headship, then make findings of fact concerning the administration's charges about Dr. Peacock's performance as department head, comment on the procedures followed in this case, and finally offer our recommendations.

Role of Department Head

In considering the role of a department head at the University of Arizona, this Committee has examined (1) the Faculty Manual, Thirteenth Edition (1973), (2) the American Association of University Professors "Statement on Government of Colleges and Universities" (1973 edition), and (3) the indications from the record in this case illustrating how the head of the surgery department functioned.

Faculty Manual. The Manual does not completely define the functions performed by department heads at the University. It does, however, list enough of them to provide a picture of the role of a department head at Arizona.

The department head is a key figure in connection with faculty and staff appointments. Although various committees may also be involved, it is the department head that makes recommendations to the Board of Regents concerning faculty and staff appointments, reappointments, nonretention, tenure, promotions, and dismissals (Section 8.03). It is the head who is required to inform faculty members of tenure and promotion decisions (Sections 8.09, 8.11-.14), who is the person to whom faculty resignations are directed (Section 8.15), who has discretion in recommending reappointment or release of a temporarily appointed faculty member (Section 8.16), and who recommends the dismissal of a faculty member (Section 8.19).

Faculty members who carry on employment for compensa-

tion beyond that called for in their job descriptions must clear such work with their department head. When the employment is outside the University and university facilities are used, the faculty member must make special financial arrangements with the department head (Section 2.29). When supplemental work is being done for the University the matter must be discussed with the department head (Section 2.31). Department heads must be informed of any conflict of interest in any government-sponsored research (Section 2.32).

Faculty leaves of absence are subject to approval by heads of departments. In the case of sabbatical leaves the head not only must give approval, but also must get evaluations of the faculty member's project (Section 2.25). For nonsabbatical leaves the head must grant approval and demonstrate that the faculty member's courses can be taught by someone else or some other adjustment can be made (Section 2.26).

Department heads have a responsibility concerning university property. They are charged with the care and custody of departmental equipment (Section 2.21). They sign purchase orders for equipment repairs (Section 2.20) and for book purchases (Section 4.09G). They also must approve travel orders (Section 2.24) and certify staff members' dependents for special fees (Section 2.38).

When a faculty member is unable to meet a class, he must notify his department head so a replacement may be found (Section 3.10). To facilitate this the Code of Conduct requires such a notification (Section 9.02), and another rule designates the department head as the person to whom faculty members must report illness or accident which cause their absence from duty (Section 2.58).

Complaints about faculty members are channeled to the department heads (Section 9.03), and appeals from faculty grading are handled by them (Section 3.18).

Among other duties and responsibilities of department heads is granting approval to students to act as tutors (Section 2.35), transmittal of course and curricular materials to appropriate university officials (Section 2.41), giving approval to off-campus questionnaires using the name of the University (Section 2.43), transmitting teaching load reports (Section 3.07), giving out field trip forms (Section 3.26), proposing university guests (Section 6.13), and getting notices of address changes of faculty and staff members (Section 2.46). Letters of resignation must be sent to heads (Section 2.51); inventions must be disclosed to them (Section 7.02-4 [a]); and requests for legal opinions must be channeled through them (Section 2.53).

It is clear from this recital that the Faculty Manual lists many duties and powers of department heads which fairly can be characterized as administrative in character. Some of these designated duties and powers are discretionary, others are ministerial; some of them have a direct relationship to the academic affairs of the department, others do not. But they all deal with management of the affairs of the department. When the additional powers of budgeting and selection of committee members are added to the list of departmental headship powers, it becomes even more apparent that, even though a head may also teach, at the University of Arizona in his role as head he is an administrator.

The Manual does not in any place give a specific listing of all university personnel regarded as administrators. It does, however, contain Faculty Bylaw 12(b)(iv) which in referring to the Committee on Academic Privilege and Tenure states: "Department *heads* and other *administrative officials* should intimate as soon as possible to new members any sense of dissatisfaction" (emphasis ours). This provision certainly regards a department head as an administrator.

AAUP Statement. Reference has been made in this case to the position of the American Association of University Professors concerning the role of a department head. The complete paragraph from that organization's "Statement on Government of Colleges and Universities" which appears to be in point reads as follows:

"The chairman or head of a department, who serves as the chief representative of his department within an institution, should be selected either by departmental election or by appointment following consultation with members of the department and of related departments; appointments should normally be in conformity with department members' judgment. The chairman or department head should not have tenure in his office; his tenure as a faculty member is a matter of separate right. He should serve for a stated term but without prejudice to re-election or to reappointment by procedures which involve appropriate faculty consultation. Board, administration, and faculty should all bear in mind that the department chairman has a special obligation to build a department strong in scholarship and teaching capacity." (See page 38 of "Statement.")

The main thrust of this paragraph is with respect to selection procedures for department heads. It also refers to the head as the "chief representative of his department within an institution," and notes his "special obligation to build a department strong in scholarship and teaching capacity." Both departmental representation and building can be characterized as involving, at least in part, performance of administrative functions.

The statement distinguishes between a person's role in the "office" of chairman or department head in which there is no tenure, and the separate right of the individual to tenure as a

faculty member. This notion that a head does not have tenure as head is consistent with section 8.06 of the Faculty Manual which states: "A member of the University faculty who holds an administrative position does not have tenure in the administrative appointment, and he does not lose academic tenure by appointment to or relief from an administrative appointment." The two provisions are parallel.

Surgery Department Functioning. Although administrative functions of the Department of Surgery were more widely sub-delegated than in many other departments of the University, the transcript of testimony shows that during his headship Dr. Peacock did personally exercise many administrative functions. For example, in the area of finances, he approached the Veterans' Hospital manager over funding of the hemodialysis program, and he offered the head of the pediatrics department financial underwriting of that department's graduate education program if collapse of the Tucson Hospitals Medical Education Program should undercut it. Dr. Peacock viewed his role as department head as including handling such external relationships as entering an objection to press coverage of a kidney transplant by another member of the surgery faculty, publicly dressing down a professor from another department in the college over a subject of concern generally to the surgery department, asking the Attorney General's office for legal information concerning the Crippled Children's Services, and becoming involved in the controversy over the appropriateness of the Tucson Hospitals Medical Education Program as a competing surgical residency program, even though he was not a member of the committee which was to look into the matter. Dr. Peacock attended and vigorously participated in various meetings in which administrative matters were discussed. He and the other clinical

department heads had weekly meetings. He attended the Dean's Committee meetings in connection with clinical work at the VA hospital.

Within the department Dr. Peacock certainly exercised an administrative role in his actions with respect to faculty meetings. He chaired the major part of most meetings; he prepared the agenda and noted it on the blackboard; he prepared the official minutes of faculty action. It was through the efforts of Dr. Peacock that much of the faculty recruitment was carried out. Although as the department grew other faculty members played a significant role, in the final analysis it was Dr. Peacock who made the recommendations for their employment. As recently as the spring of 1973 he hired Douglas Lindsey as a member of the faculty.

Several surgery department members testified before the Committee that they did not regard a department head as an administrator. In spite of that, they made it quite clear that they did regard Dr. Peacock as their "chief representative" within the College of Medicine; they praised him for building a strong department; and they acted with respect to him as though Dr. Peacock were in fact an administrator.

Relationships of Department Heads. During the hearings in this case much was said about departmental democracy, especially about that principle of democracy which involves reaching departmental decisions by majority vote. The evidence shows that in the surgery department the concensus mechanism often led to unanimous votes.

We should also be cognizant of some of the other principles of democracy which are important in academia as well as in government. Among them is the concept of checks and balances that requires operating within the established framework of the University for conducting departmental affairs. A

department functions within the University, not as an independent unit, but as an entity subject to certain checks and balances. It must work with and adjust to comparable units, that is, other departments. It must function within a framework which gives such administrative officials as deans veto power in certain instances over what the department may want to do. The department must be prepared to respond to these lateral and vertical objections to its proposals and actions by willingness to compromise, rather than by insisting that its position must prevail at all cost simply because it is the result of some form of majority concensus within the department.

The head of a department must be more than the representative of the departmental faculty. He also is a member of the administration. He cannot function effectively unless he has the confidence of both his faculty and the college administration. The department head also must be able to relate well to heads of other departments whose educational functions are related. The head must be able to communicate within his own department, to other departments, and to the college administration. He has a special responsibility to effect compromise for the good of the total University; the self-interest of his department requires it.

Should the faculty or college administration find itself in conflict with the department head or should there arise dissension among department heads, then all parties have the responsibility of thoughtful deliberation. In such a situation the administration should be sensitive to faculty opinion. It also has the responsibility to judge in the broader context of the welfare of the college and of the University as a whole.

Findings on Charges

Traditionally at the University of Arizona department heads

have been regarded by the college and University administrations as fellow administrators; department heads have not been considered to possess tenure in their headships; and department heads have served at the pleasure of their administrative superiors in that they have been subject to dismissal without formality and for whatever reasons the college or University administrations deemed adequate. Judge Turrentine, however, upset this tradition by ruling in his May 3, 1974 order that Dr. Peacock had a contract right to his position as department head. In a Notice of Appointment dated May 24, 1973, Dr. Peacock was designated both as Head of the Department of Surgery and as Professor of Surgery. Acceptance of this document by signing it and returning it to the office of the President, according to the judge, created a contract.

Although the University administration continued Dr. Peacock's salary until the end of June 1974 and the Notice of Appointment by its terms only applied until that time, this Committee sees merit in the argument that Dr. Peacock nevertheless had a property interest which was adversely affected by his ouster as department head. Assuming that such is the case, he should not have been removed unless there was an objectively adequate basis of such action. We find that the two charges filed with this Committee by counsel for the university administration would, if substantiated by the facts, form an adequate basis for Dr. Peacock's removal.

Several witnesses, including Dr. Peacock, complained that the charges were vague and lacked the specificity necessary for presentation of an adequate defense. Had counsel for Dr. Peacock participated in the hearing and requested that the Committee require the University administration to supply a bill of particulars which would list specific incidents which might support the charges, the motion might well have been

granted. Since Dr. Peacock was not represented by an attorney at the hearing, no such motion was made. Instead the Committee, and to some extent counsel for the University administration, questioned witnesses with respect to specific incidents which could be classified as supporting one or the other or both of the charges. In his examination by the Committee, Dr. Peacock was asked about these incidents. He responded using notes previously made which indicated that he was in fact aware of which events would likely be used to substantiate the charges. Other persons called by the Committee were also well prepared to provide us with information concerning the incidents that were in question.

Testimony of the events leading to the October 1973 removal of Dr. Peacock from the headship can be categorized into six groups. They are: (1) Proposed transfer of Viet Nam War casualties, (2) Tucson Veterans Administration Hospital relationships, (3) Tucson Hospitals Medical Education Program relationships, (4) proposed transfer of Pima County Hospital patients, (5) Medical Services Plan controversy, and (6) other interpersonal relationships.

Proposed Transfer of Viet Nam War Casualties. After his decision to accept the appointment as the head of the Department of Surgery, but prior to his arrival at the University of Arizona in February of 1969, Dr. Peacock approached two officials of the Veterans Administration in Washington, D.C. with a proposal concerning transfer of certain Viet Nam War casualties from military to veterans' hospitals. Although there is conflict in testimony before us whether this action was unilateral, it was established that the manner of Dr. Peacock's approach was regarded by the officials as offensive. Dean DuVal found it necessary to repair the relationship with the Veterans Administration. At that time the College of Medicine was

planning for the use of the facilities of the Tucson Veterans Administration Hospital in conjunction with its clinical instruction until a university hospital could be constructed, and hence good relationships with the VA were essential. Dr. Peacock apologized for this incident, and Dr. DuVal did not let it inhibit him in completing the formalities necessary for hiring Dr. Peacock.

Tucson Veterans Administration Hospital Relationships. While he was heading the University's clinical instruction in surgery at the Tucson VA Hospital, Dr. Peacock antagonized the hospital administration by his conduct toward them. Two specific incidents illustrate something of these difficulties. At a Dean's Committee meeting Dr. Peacock reproached Dr. William Denny, an official of the hospital, in extremely strong terms, and, in Dr. Peacock's words, "backed him down." Dr. Denny responded with a letter to Acting Dean Jack Layton dated August 5, 1971, in which he commented: "I was astounded at the vituperation, and insulting, degrading comments delivered by Dr. Peacock. I have never been exposed to more rude manners, to less productive exchange of comments, than were delivered by Dr. Peacock. . . . We have an excellent working relationship disturbed only by Dr. Peacock's hostile and belligerent personality and his constant criticism of the Medical Service."

Dr. Denny, when he came before us as a witness, affirmed that he stood by the language quoted above. He did, however, retreat from another comment in his letter in which he made reference to Dr. Peacock firing residents. Dr. Peacock denied this and Dr. Denny withdrew his charge.

Dr. Peacock's response to Committee questions about his relationships with personnel at the VA hospital pointed out some of the deficiences at the hospital when the surgery

department undertook its clinical education program there. His concern over the problems relating to health care and medical education there was genuine; his manner of expressing it to the people involved was inappropriate. Dr. Peacock himself characterized for the Committee the impact of his conduct. "The doctor was mad, wasn't he, when he wrote that."

Another example of the difficulties in University VA Hospital relationships caused by Dr. Peacock related to funding of the hemodialysis program at the Veterans Administration Hospital in Tucson. Starting in September 1969 locally available funds were used to support the program. Because the local support exceeded the amount that the VA Washington office would approve, when other monies from Washington became available, instead of being used for other projects, they were allocated to reimburse the sources that made initiation of the hemodialysis program possible. Dr. Peacock, however, took exception to the decision, visited the hospital manager, and lodged an intense argument with him that the decision was bad. The manager filed a formal complaint with Dean DuVal who on September 15, 1970 wrote a memorandum to Dr. Peacock which stated that his "involvement in this case is meddlesome and not in the best interest of interdepartmental harmony." The director of the hemodialysis project was not a member of the surgery department.

Tucson Hospitals Medical Education Program Relationships. Before there was a medical school at the University of Arizona three Tucson hospitals had established a residency program known as the Tucson Hospitals Medical Education Program. Before the completion of the Arizona Medical Center it was very important to the school to have good

working relations with THMEP. Particularly the pediatrics and obstetrics departments, who could not do clinical work at the VA as could the other clinical departments, found cooperation essential. Nevertheless there was some tension between the school and THMEP because they operated competing graduate medical education programs.

Dr. Peacock made it quite clear that he regarded having two competing surgical education programs as inappropriate. He believed that he could not achieve educational objectives in his department by any affiliation with THMEP. At one time he negotiated for transfer of surgical patients from a hospital affiliated with THMEP which he commented would, if successful, have destroyed THMEP. In a letter to Dr. DuVal, who then was in Washington, Dr. Peacock told us that he said to him: "It is going to be interpreted as the cleaver dropping on THMEP and they are right, it is."

Although Dr. Peacock's cleaver did not in fact destroy THMEP, it did anger Dr. Eric Ramsay, the head of THMEP. With respect to this controversy Dr. Peacock told the Committee: "It looks like we got another fellow mad at me, doesn't it?' That is an accurate appraisal of Dr. Ramsay's letter of November 5, 1973 to Dr. DuVal. He noted that "in surgery . . . the relationship has been hostile and totally frustrating." He commented on Dr. Peacock's "personal antipathy," and his "repeated efforts . . . to control the county surgical patients." He then launched into an attack upon Dr. Peacock's performance at the Arizona Medical Center.

Proposed Transfer of Pima County Hospital Patients. It is the policy of the Board of Regents not to accept charity patients at the Arizona Medical Center. Pima County Hospital which is the county's charity hospital in Tucson is over-

crowded. Dr. Peacock wished to do something to take the pressure off the Pima County Hospital by taking patients from it. Although he went to the administrator of the Arizona Medical Center before contacting county officials, he did not inform Dr. Jack Layton who was at that time Acting Dean of the college. When Dean Layton learned of Dr. Peacock's action, he impressed upon Dr. Peacock that the college administration should be notified of that sort of approach outside the college. Dr. Layton testified that Peacock's action had compromised discussions he was conducting with people in the community for dealing with under-served Tucsonans.

Medical Services Plan Controversy. When Dr. DuVal returned from Washington and became Acting Dean of the College of Medicine early in 1973 he was told by Dr. Layton that there were two problems in the college that required his immediate attention. One was the difficulties with the surgery department; the other was the controversy over the Medical Services Plan. Dr. DuVal took the MSP matter up with the clinical department heads, and until March they discussed ways and means of getting the departments in compliance with the plan by revamping it so that it could effectively take care of the so-called "salary gaps"—the difference between a faculty member's state salary and the amount he could command in practice, the research needs of the departments, and the over-all needs of the college. A few department heads, including Dr. Peacock, sought a re-written plan which would (as compared with the plan forwarded by the other heads) favor the departments over the college. The majority, however, favored what could be described as the "college plan." A vote of the heads was taken on March 14, 1973 in which the majority prevailed. The matter of wording of the plan was

delegated to the dean and in two weeks he returned with the final version which then was approved. It was understood that this plan was to be presented to the Board of Regents and that after a year of experience with it the whole matter was to be re-opened. Resolution of the MSP question came only after compromise which had followed considerable controversy.

Dr. Peacock told us that he considered the March 14 vote as a mere "straw vote." Dr. DuVal did not so regard it; he considered it as a binding vote, and he understood that the department heads had agreed to be bound by a majority vote. Dr. Paul Capp, Head of the Radiology Department, sided with Dr. Peacock in the deliberations of the clinical department heads. Nevertheless he testified that it was his view that "so far as I was concerned, it was settled."

Dr. Capp further testified that "the reopening of the plan, you know, did cause some problems in terms of opening up another can of worms." It was Dr. Peacock who opened that can by attempting to persuade other department heads to reverse their position and by suggesting that surgery would withdraw from the plan. Although surgery has not done so, the threat was quite disruptive to the medical school.

Other Interpersonal Relationships. The Committee finds that in his interpersonal relationships Dr. Peacock did more than once abuse his status. Dr. Capp testified that Dr. Peacock had made a highly emotional telephone call to him concerning radon seeds. He became totally incensed over the telephone, and then stormed into the Radiology Department office and there "exhibited the kind of behavior that is difficult to put into words, totally intimidating and in an emotional uproar. . . ."

In another instance Dr. Peacock demanded a vehicle from

the car pool, was told that none were available, and thereupon acted in such a "totally intimidating" manner that he "virtually emotionally destroyed" the car pool manager. The man was so shaken that he pulled a set of keys off the wall, threw them to Dr. Peacock, locked his doors, went to his superior and said "I quit. I will take no more of this."

While they were passengers on the same airplane, Dr. Peacock braced Dr. Irwin Fruendlich, Chief of the Diagnostic Division of the Department of Radiology, about a mechanical problem in diagnostic radiology. Dr. Peacock became so upset about it that he stated to Dr. Fruendlich, "If you can't settle this, we don't want to have to get rid of you and Paul." Among the passengers who overheard the conversation was another university professor.

When Marilyn Drago, a local newspaper reporter, reported a story which Dr. Peacock apparently thought her paper had agreed not to report, he called her and, according to her testimony, "he yelled, he said that I was absolutely disgusting. . . . [H]e said I was repugnant, that no physician at the medical school would ever allow me to interview him again, that all my work was completely incompetent, it was unprofessional, it was unethical and then he said, 'How dare you call yourself a science writer?' And then he said, 'Do you realize you're going to be responsible for the deaths of 150 kidney patients?' "

Dr. Peacock apologized for this incident. It nevertheless provoked the newspaper to lodge a formal complaint with the President of the University.

Cumulative Effect. Some of these incidents are explainable as misunderstandings. Others are explained in terms of impatience, momentary anger, etc.; and apologies have been extended in some of the situations. In some of these instances

we have noted a conflict in testimony. The cumulative weight of evidence convinces us that, even though some of the specific issues are not resolved, the testimony does support the charges. In his dealings with Dr. Fruendlich, Dr. Capps, and his fellow clinical department heads within the College of Medicine, Dr. Peacock did conduct the affairs of the Department of Surgery in an unprofessional manner inimical to the best interests of the College of Medicine. His dealings with personnel of the Veterans Administration, Dr. Ramsay, and Mrs. Drago outside of the College can similarly be characterized.

Trust and Confidence. Dr. Schaefer and Dr. DuVal both testified that they had lost confidence in the ability of Dr. Peacock to perform adequately as a department head. Dr. Oscar Thorup, head of internal medicine, referred to Dr. Peacock's conduct as "disruptive" and responded in an affirmative manner to the question whether the time came when he had lost his "trust and confidence" in Dr. Peacock. Dr. Vincent Fulginiti, head of pediatrics, testified that after one incident with Dr. Peacock he could no longer trust him.

The difference between the need for trust and confidence among the department heads in the College of Medicine and the need for such relationships among other heads at the University may be one of degree; it is not one of kind. It is essential to the operation of the institution that fellow department heads can rely upon the conduct and statements of each other. It is an improper burden on these administrators to ask them to ascertain what really lies behind the words and acts of another department head.

The Committee has in its possession affidavits from all of the clinical department heads which were filed in connection with the lawsuit. They can be generally characterized as

supporting the proposition that removal from the headship of the Department of Surgery of Dr. Erle Peacock has not interferred with the programs of their departments and that his reinstatement would not improve their programs. Some of them go further and state that his presence was divisive and that his reinstatement would not be in the best interests of the College of Medicine.

Freedom of Speech and Academic Freedom. It is our judgment that Dr. Peacock was *not* removed from his headship position because he expressed differences with other persons. It was the manner of his expression that contributed to the events for which he was removed. His constitutional right to free speech has not been infringed.

Judge Turrentine has expressed his view that no issue of academic freedom is present in this case. We do not see the matter quite that simply. Although this case may not directly involve academic freedom, there are quite clearly overtones of academic freedom issues. If removal of Dr. Peacock were intended to bring about a change in the teaching approach of the department or to induce the faculty to alter its educational goals and means, then not only would it have impinged upon his academic freedom, but also upon that of the faculty members within the department. There is no indication that Dr. DuVal acted with such intent. Indeed so far as we have been able to ascertain subsequent to Dr. Peacock's removal there has been no appreciable change in either the educational goals within the surgery department or the means whereby they have been effected.

One member of the surgery department faculty reminded the Committee that the faculty must have an effective channel of communication to the administration of the college and of the university. If the dean and the president

have lost confidence in the department head, an important channel of communication is blocked and to that extent the department faculty members have lost their academic freedom. Communication involves not only channeling information from the faculty to the administration of the college, but also from the college level to the departmental level. It is entirely consistent with the concept of academic freedom to replace a department head who cannot communicate *both* ways with one who can.

Academic freedom does not imply the right of one group or department to go exclusively its own way in disregard of the institution as a whole. The dean's duty is to blend the welfare of the various department faculties with the overall welfare of the college. A department head is the message center for the necessary two-way communication.

Dr. Peacock referred to himself as a man with a "mission." His ends may have been justifiable; his means of achieving them have in the instances detailed herein been unjustifiable. His conduct as a department head made it impossible for him to work effectively with the other clinical department heads for the good of the University of Arizona College of Medicine.

Procedures Followed In This Case

Since it has been ruled that a contract interest is involved in this case, it is incumbent upon the Committee to comment upon the procedures used by the University administration in affecting that interest. Due process of law must be followed in any taking of property and a contract right is a property interest. In order to comply with due process procedure, there must be adequate notice and a proper hearing.

Dr. Peacock contends that he has not yet received notifica-

tion of the reasons why he was removed as department head. We do not agree. Dr. DuVal's testimony on rebuttal categorically stated that as early as his conference with Dr. Peacock about May 11, 1973 when he first informed Dr. Peacock that there would have to be a change in the departmental administration, he gave Dr. Peacock a list of reasons for the action he indicated he was going to have to take. It is noteworthy that during the spring of 1973 Dr. DuVal also informed another department head that it would be necessary for a change in departmental leadership. Dean DuVal testified that as soon as he was aware of the nature of the difficulty in the other department, he telephoned the other department head who was out of the country and gave him notice of the reasons for the required change in leadership.

The other change in the medical school was effected gracefully and without any public acrimony or embarrassment—at least there was no embarrassment until it became public knowledge due to the controversy over the Department of Surgery change. It is usual for such shifts to be accomplished smoothly, and it is likely that Dr. DuVal believed that such would be the case with the Department of Surgery. He was wrong. Dr. Peacock, backed by members of his department, decided to resist the change. He had two interviews with President Schaefer about the headship, interviews which neither persuaded Dr. Peacock to acquiesce nor Dr. Schaefer to withhold his support from Dr. DuVal. In August 1973 Dr. DuVal attended a surgery department faculty meeting. He neither convinced the surgeons of the appropriateness of his proposed course of action nor was he convinced by them to not take it. Later the department voted to re-affirm Dr. Peacock's leadership as department head. During all of this time Dr. DuVal did not make any public announcement of

the reasons for demanding Dr. Peacock's resignation. To do so would have unnecessarily embarrassed Dr. Peacock, if he had elected to resign quietly. Not doing so, however, caused the members of the department to conclude that there were no adequate reasons for the dismissal that was impending. It is possible that their understandable attitude helped to convince Dr. Peacock that he was not given the reasons for the headship action.

As the positions of the two sides hardened, the University administration undertook an increasingly thorough investigation of Dr. Peacock's performance as department head. As they did so new information about events which became a part of the accumulation we earlier referred to came to light. But by the time of the preliminary injunction hearings in Phoenix in March of this year, Dr. Peacock surely knew the nature of the case against him.

The University's statement of charges of June 17 constitutes an express notification of why the action was taken. We have earlier addressed ourselves to the adequacy of that notice when coupled with the occurrences at the hearing.

The University did not give Dr. Peacock a formal hearing prior to the actions of October 1973 when he first was dismissed and of May 1974 when he was reinstated and immediately suspended from performance of his duties as department head. When it became obvious to Dr. Peacock that he would be removed, and it must have before he was in fact removed, he could have gone to the Committee on Conciliation and thereafter he could have sought the help of this Committee. He did not do so. Nothing in the Faculty Manual would have prevented Dr. DuVal and President Schaefer from having given Dr. Peacock a formal hearing, if he wished one, before action was taken.

Instead of formal proceedings, the University administration used informal conferences with Dr. Peacock and the department, not for the purpose of fact-finding, but in a futile effort to persuade Dr. Peacock to bend to their will. These informal conferences were not an adequate substitute for a full hearing.

The administration did, however, as early as December 5, 1974 make a public announcement that it was ready to lay the facts before this Committee if Dr. Peacock invoked our jurisdiction. It was this offer that Judge Turrentine directed the University administration to keep open insofar as it applied to another issue concerning these parties. The offer initially, however, related only to the dismissal of Dr. Peacock from his headship.

We believe that the hearing which we have held was indeed a full hearing and a complete airing of the facts of the case. We wish it had come sooner, but it was held. The Judge's order to the administration to make this hearing available broke the Alphonse and Gaston act of the parties. There now has been a proper hearing.

Recommendation

The Committee therefore recommends that the suspension of Dr. Earl E. Peacock, Jr. from his duties as department head on or about May 8, 1974 now become a permanent dismissal from that position.

/s/ David L. Hetrick

David L. Hetrick, Chairman

/s/ Raymond Thompson

Raymond Thompson

/s/ Ray Davis

Ray Davis

THE UNIVERSITY OF ARIZONA
TUCSON, ARIZONA 85721

OFFICE OF THE PRESIDENT

September 27, 1974

Erle E. Peacock, Jr., M.D.
4525 North Hacienda del Sol
Tucson, Arizona 85718

Dear Dr. Peacock:

I have reviewed and considered the report submitted to me by the University Committee on Academic Privilege and Tenure regarding the headship of the Department of Surgery.

I have decided to accept and abide by the recommendations of the Committee.

Yours sincerely,

/s/ John P. Schaefer
John P. Schaefer

JPS:mm

cc: Dr. D. Hetrick
Dean Vanselow
Dr. DuVal

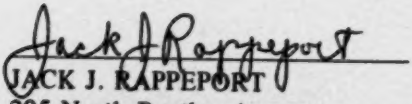
CERTIFICATE OF SERVICE

I, JACK J. RAPPEPORT, certify that the respondents' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT was served upon counsel of record by personal delivery of three (3) copies of said brief on June 5, 1975 to:

William Lee McLane, Esquire
McLane & McLane
2970 Valley Center
Phoenix, Arizona 85073

and by depositing three (3) such copies in the United States mail on June 4, 1975, postage prepaid, to:

Jeremy E. Butler, Esquire
Lewis & Roca
100 West Washington, 23rd Floor
Phoenix, Arizona 85003



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